

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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CALIFORNIA INDEPENDENT
SYSTEM OPERATOR CORPORATION,

Plaintiff,

v.

RELIANT ENERGY SERVICES,
INC., et al.,

Defendants.

NO. CIV. S-01-238 FCD/JFM

ORDER GRANTING PRELIMINARY
INJUNCTION

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This lawsuit concerns the obligation of certain generators to respond to emergency dispatch instructions¹ for electric power issued by plaintiff California Independent System Operator Corporation ("the ISO").² This matter is

¹ The term "emergency dispatch instruction" is synonymous with "emergency dispatch order." The court uses the term "instruction" herein because that is term used in the ISO Tariff, and by the Federal Energy Regulatory Commission ("FERC").

² Defendants include Reliant Energy Services, Inc., Reliant Energy Ormand Beach LLC, Reliant Energy Mandalay, LLC, Reliant Energy Etiwanda, LLC, Reliant Energy Coolwater, LLC, and Reliant Energy Ellwood, LLC (collectively referred to herein as "Reliant"), Williams Energy Marketing & Trading

1 before the court on the following motions: (1) the ISO's
2 motion for preliminary injunction requiring Reliant to respond
3 to emergency dispatch instructions issued by the ISO;³ (2)
4 Reliant's motion to dismiss the action for lack of
5 jurisdiction, or alternatively, to stay the action under the
6 doctrine of primary jurisdiction; and (3) the California
7 Department of Water Resources' ("DWR") motion to dismiss the
8 third-party complaint filed against it by Reliant on Eleventh
9 Amendment immunity grounds. By this order, the court now
10 rules on the pending motions

11 BACKGROUND

12 1. California's Electric Power Market

13 The ISO is responsible for controlling and maintaining
14 California's electric power transmission grid. As part of its
15 responsibilities, the ISO acts as a power "broker" between the
16 generators and utilities. These transactions are governed by
17 the ISO Tariff.⁴

18 California's electric power market is comprised of two
19 sub-markets: the "advance market" and the "real time market."
20 In the advance market, the ISO accepts and coordinates power

21 _____
22 Company ("Williams"), AES Placerita Inc., AES Alamitos, LLC,
23 AES Huntington Beach, LLC, AES Redondo Beach, LLC
(collectively "AES"), and Dynegy Power Corporation ("Dynegy").

24
25 ³ As discussed below, all defendants except Reliant have
26 entered into a stipulation with the ISO which moots, at least
temporarily, the ISO's pending motion for preliminary
injunction as to those defendants.

27 ⁴ The ISO Tariff was filed with and approved by the
28 Federal Energy Regulatory Commission pursuant to Section 205
of the Federal Power Act, 16 U.S.C. § 824d.

1 "schedules" submitted by utilities that qualify as "scheduling
2 coordinators." These schedules represent advance statements
3 of the quantities of electricity the scheduling coordinator
4 anticipates its customers will consume the day after the
5 schedule is submitted, together with quantities of electric
6 generation that the scheduling coordinator anticipates having
7 available the next day to meet those projected demands. This
8 process is repeated an hour before actual operations, to give
9 the utilities a chance to make adjustments to their schedules
10 to account for changes in weather, the status of generating
11 units and other factors. See ISO Tariff §§ 2.2.3, 2.2.11 -
12 2.2.13.

13 Even with the opportunity for hour-ahead adjustments,
14 actual customer demand for electricity and actual output of
15 generating units may differ from the demands and operating
16 levels reflected in the utilities' schedules. The ISO is
17 responsible for ensuring that unscheduled demands for
18 electricity in real time operations are matched by additional
19 electricity from generating units. If customer demand is not
20 met by scheduled supplies in the advance market, the ISO must
21 procure additional electricity to maintain the reliability of
22 the transmission grid and serve customer demand. To meet
23 unscheduled demands, the ISO accepts bids from generators to
24 supply electricity in real time. The bid portion of the real
25 time market is referred to as the "imbalance market." When
26 the amount of electricity available to the ISO in the
27 imbalance market is insufficient, the ISO issues emergency
28 dispatch instructions to its participating generators which

1 are obligated, under the ISO Tariff, to supply power when
2 called upon by the ISO to avert outages. See id. § 5.1.3. If
3 the ISO is unable to obtain sufficient power through the
4 issuance of emergency dispatch instructions, it must order
5 rolling blackouts in order to avoid a system-wide "crash" of
6 the transmission grid. The obligation of generators to
7 respond to emergency dispatch instructions is the subject of
8 this action.

9 **2. The California Power Crisis**

10 On January 17, 2001, Governor Gray Davis proclaimed a
11 State of Emergency in response to California's energy crisis.
12 In January and February 2001, the ISO declared a series of
13 "Stage 3" Emergencies. See Ex. A to Stout Decl., filed Mar.
14 15, 2001. Stage 3 Emergencies are declared only when
15 electricity operating reserves fall below (or are expected to
16 fall below within the next two hours) a margin of 1 to 1-1/2
17 percent.

18 The serious financial problems of California's investor-
19 owned utilities, Pacific Gas & Electric ("PG&E") and Southern
20 California Edison ("SCE"), have contributed significantly to
21 the crisis.⁵ As a result of these problems, many power
22 generators, including Reliant, have not been paid for a
23 significant portion of the electricity they have supplied, and
24 are reluctant to continue selling electricity to the utilities
25

26 ⁵ PG&E and SCE have incurred enormous debts buying
27 wholesale power at prices that exceed the prices they can
28 charge their customers. PG&E and SCE have defaulted on
various debts, precipitating financial uncertainty throughout
the industry.

1 (via the ISO) in the absence of assurances they will be paid.

2 To ensure the continued flow of electricity, on December
3 14, 2000, the then-Secretary of the United States Department
4 of Energy stepped in and ordered a host of power generators,
5 including Reliant, "to make arrangements to generate, deliver,
6 interchange, and transmit electric energy when, as, and in
7 such amounts as may be requested by the [ISO]."⁶ Amendment 2
8 to Jan. 11, 2001 Ord., dated Jan. 23, 2001, attached as Ex. D
9 to Verified Compl., filed Feb. 6, 2001. In anticipation of
10 the expiration of that order, on February 7, 2001, the ISO
11 sent a letter to generators operating in its market pursuant
12 to the ISO Tariff, requesting assurances that the generators
13 would continue to comply with any and all emergency dispatch
14 instructions issued by the ISO notwithstanding the financial
15 problems described above, and in the absence of any assurances
16 that they would be fully compensated for power supplied
17 pursuant thereto, or for power previously supplied.⁷

18
19 ⁶ The order was subsequently extended by the current
Secretary of the United States Department of Energy.

20 ⁷ The letter stated in pertinent part:

21 As you are probably aware, recent Securities and
22 Exchange Commission filings by [the California
23 utilities] indicate that the ISO may not be paid in
24 full when settlement payments fall due on February
25 2, 2001. In that event, the ISO will make only pro
26 rata payments to suppliers for these services as
27 provided in the Tariff. Despite these
circumstances, the ISO is committed to carrying out
its mission of ensuring reliable, continuing service
to California consumers and so asks for your
commitment to comply with any and all dispatch
instructions to units covered by the PGA.

28 Jan. 31, 2001 letter, attached as Ex. I to Verified Compl.,
filed Feb. 6, 2001.

Defendants' failure to provide adequate assurances in this regard prompted the instant action.⁸

/ / /

3. Current Market Share Of Emergency Dispatch Instructions

As outlined above, the ISO issues emergency dispatch instructions when (1) customer demand in the real time market is not met by scheduled supplies in the advance market, and (2) the is unable to make up the shortfall through bids from generators to supply power in real time. In recent months, the real time market has constituted approximately 25% of the entire market. See Detmers Decl., filed Mar. 20, 2001, ¶ 8, and Ex. E attached thereto. Emergency dispatch instructions have constituted approximately 50% of the real time market. Id. Thus, in recent months, emergency dispatch instructions have accounted for roughly 12.5% of all power supplied through the grid. Id.

4. DWR's Entry Into The Market

Earlier this year, DWR was appropriated significant funds with which to purchase electricity,⁹ and has entered into a number of long-term contracts with generators. As discussed below, last month DWR entered into a short term agreement with

⁸ It should be noted that AES does not take issue, at least in the present litigation, with the creditworthiness issue, but rather, with its obligation to respond to emergency dispatch instructions where such response would violate state and/or federal environmental laws. The court addressed this issue in its temporary restraining order. See TRO, filed Feb. 8, 2001, at 11 n.6.

⁹ See California Assembly Bill 1x (approved by Governor Feb. 1, 2001; filed with Sec'y of State Feb. 1, 2001); Senate Bill 7x (approved by Governor Jan. 19, 2001; filed with Sec'y of State Jan. 19, 2001).

1 Reliant in which it agreed to pay for power provided pursuant
2 to emergency dispatch instructions.

3 **5. The Instant Litigation**

4 The ISO filed this action, along with an application for
5 temporary restraining order, on the morning of February 6,
6 2001.

7 Reliant immediately filed a motion to dismiss the action for
8 lack of jurisdiction. The court heard the ISO's application
9 for temporary restraining order later that day, and granted
10 the application as to Reliant, ordering Reliant to continue to
11 sell electricity to the utilities via the ISO and to continue
12 to respond to emergency dispatch instructions.¹⁰ The order was
13 to remain in effect pending a further hearing on the matter on
14 February 7, 2001 at 3:00 p.m. The remaining defendants
15 stipulated that they would continue to respond to emergency
16 dispatch instructions until the conclusion of that hearing,
17 and thus, were not subject to the court's temporary
18 restraining order.

19 At the February 7, 2001 hearing, the court denied
20 Reliant's motion to dismiss and extended the temporary
21 restraining order against Reliant until 5:00 p.m. (PST) on
22 February 8, 2001, pending issuance of a written order. The
23 remaining defendants again stipulated that they would continue
24 to abide by the provisions of the ISO Tariff, and would
25 continue to respond to emergency dispatch instructions, until
26

27 ¹⁰ The court also granted the motion of the State of
28 California *ex rel* Electricity Oversight Board ("EOB") to
intervene in this action at the February 6, 2001 hearing.

1 that time. See Feb. 7, 2001 Hr'g Trans. at 100-01. The court
2 further ordered defendants to appear on February 16, 2001 to
3 show cause why a preliminary injunction should not issue. In
4 its written order filed February 8, 2001, the court enjoined
5 all defendants, requiring them to comply with the terms of the
6 ISO Tariff and to continue to respond to emergency dispatch
7 instructions pending the February 16, 2001 hearing and
8 disposition of the order to show cause. See TRO at 11.

9 / / /

10 On February 12, 2001, Reliant filed an application for a
11 temporary restraining order against the ISO, a motion to join
12 DWR as a party, and a third-party complaint against DWR. On
13 February 14, 2001, DWR filed a motion to dismiss the third-
14 party complaint on Eleventh Amendment immunity grounds.¹¹ On
15 February 15, 2001, Reliant filed a second motion to dismiss
16 for lack of jurisdiction, or alternatively, to stay based on
17 the doctrine of primary jurisdiction. These motions, as well
18 as Reliant's application for a temporary restraining order,
19 were set for hearing on February 16, 2001, along with the
20 ISO's motion for preliminary injunction.

21 At the February 16, 2001 hearing, Reliant withdrew its
22 motion for temporary restraining order. See Feb. 16, 2000
23 Hr'g Trans. at 68, 83. At the close of the hearing, the court
24 took the remaining matters under submission, and stated its
25 intent to issue a written order not later than Wednesday,

26
27 ¹¹ The parties agreed that DWR's opposition to Reliant's
28 motion to join DWR as a party was properly treated as a motion
to dismiss the third-party complaint. See Feb. 16, 2001 Hr'g
Trans. at 67-68.

1 February 21, 2001 at 5:00 p.m. The court also extended the
2 temporary restraining order to 5:00 p.m. on February 21, 2001.
3 Id. at 112-14.

4 During the course of the February 16 hearing, at side
5 bar, the court was informed by counsel for Dynegy and Reliant
6 that those defendants had entered into agreement with DWR,
7 which, according to the same counsel, obviated the need to
8 rule on the pending motions. Those agreements, however, were
9 not available at the close of the hearing, and were not made
10 available to opposing counsel or the court until Monday,
11 February 19, 2001 (Reliant-DWR agreement) and Tuesday,
12 February 20, 2001 (Dynegy-DWR agreement).¹²

13 On February 21, this court held a telephonic status
14 conference in camera to discuss the effect of those agreements
15 filed under seal on the pending motions and litigation. Based
16 on the terms of those confidential agreements and the
17 representations of counsel, it appeared the parties might
18 enter into a stipulation which would temporarily moot the
19 pending motions. Accordingly, at the request of the parties,
20 the court set the matter for a telephonic status conference in
21 camera on February 23, 2001 at 2:00 p.m. to allow the parties
22 sufficient time to enter into such a stipulation, and extended
23 the temporary restraining order to 5:00 p.m., Friday, February
24 23, 2001. See Order Extending TRO, filed Feb. 21, 2001.¹³

25
26 ¹² Those agreements were filed under seal.

27 ¹³ Because the telephonic status conference would
28 necessarily involve a discussion of the contents of the
confidential agreements between defendants and DWR, which were

1 On February 23, the ISO, Reliant, Dynegy and Williams
2 submitted a stipulation and proposed order pursuant to which
3 those defendants agreed to comply with emergency dispatch
4 instructions until 5:00 p.m. on March 19, 2001.¹⁴ At the
5 February 23 status conference, the ISO and AES also entered
6 into a stipulation pursuant to which AES agreed to comply with
7 emergency dispatch instructions. A further status conference
8 was set for March 16, 2001. The temporary restraining order
9 expired at 5:00 p.m. on February 23, 2001.

10 On March 9, 2001, the parties filed a joint status
11 conference statement and advised the court that Dynegy had
12 orally agreed to extend the February 23, 2001 stipulation
13 pending a ruling by the FERC on an "emergency request" filed
14 with the FERC on February 22, 2001,¹⁵ and that Williams was
15 willing to do the same. With respect to the remaining
16 defendants, the parties essentially agreed that the pending
17 motions were properly deemed submitted.

18 At approximately 4:00 p.m. on Thursday, March 15, 2001,
19 the court received Reliant's supplemental opposition to the
20 ISO's motion for preliminary injunction. Two supplemental
21 supporting declarations containing extensive exhibits were
22 received approximately one hour earlier. These supplemental

23 _____
24 filed under seal, the court, at the request of the parties,
25 again ordered that the telephonic status conference take place
26 in camera.

27 ¹⁴ The stipulation and order also provided for termination
28 by any party on two-days notice.

¹⁵ The substance of this request is discussed below in
connection with Reliant's motion to stay.

1 documents were submitted without the court's permission.
2 However, at the March 16, 2001 status conference, the ISO and
3 the EOB were granted permission to file supplemental replies
4 not later than March 20, 2001.

5 At the March 16, 2001 status conference, Dynegy, Williams
6 and AES stipulated on the record that they would continue the
7 February 23 stipulations until the FERC ruled on the February
8 22 emergency request. See Mar. 16, 2001 Hr'g Trans. at 5-7.
9 The ISO accepted their stipulation, and agreed that its motion
10 for a preliminary injunction was mooted, at least temporarily,
11 as to those defendants. See id. at 6-7. Reliant would not
12 enter into a similar stipulation. Reliant did, however, agree
13 to stipulate to respond to emergency dispatch instructions
14 until 5:00 p.m. Wednesday, March 21, 2001, to allow the ISO
15 and the EOB an opportunity to respond to its supplemental
16 brief. See id. at 29-30.

17 The court has received and reviewed the ISO's and the
18 EOB's supplemental replies, the ISO's objection to the
19 Declarations of Thomas Hixson and exhibits attached thereto,
20 and the extensive briefing submitted by all parties in
21 connection with the ISO's motion for preliminary injunction,
22 Reliant's motion to dismiss, and DWR's motion to dismiss
23 Reliant's third-party complaint. The court has also given
24 careful consideration to the arguments and testimony presented
25 at the hearings on these matters. For the reasons set forth
26 below, Reliant's motion to dismiss or stay is denied, DWR's
27 motion to dismiss is granted, and the ISO's motion for a
28 preliminary injunction is granted subject to the limitations

set forth below.

ANALYSIS

1. Reliant's Motion To Dismiss Or Stay

On February 15, 2001, Reliant filed a motion to dismiss or stay based of the FERC's February 14, 2001 order. Reliant moved this court to dismiss the underlying action in its entirety for lack of jurisdiction and failure to state a claim on which relief can be granted, or alternatively, to stay the action under the primary jurisdiction doctrine.

A. Motion to Dismiss

Reliant's motion to dismiss hinges on its interpretation of the FERC's February 14, 2001 order as finding that "the credit provisions of the Tariff do apply to real time transactions." Reliant's Mem. of P. & A. in Support, filed Feb. 15, 2001, at 2 (emphasis in original). Reliant's interpretation finds little, if any, support in the FERC's order. Before addressing the merits of Reliant's argument, some background information concerning the FERC's order is required.

On February 14, 2001, the FERC issued an "Order Addressing Creditworthiness Tariff Provisions Proposed By the California Independent System Operator And California Power Exchange." See FERC Ord., filed Feb. 14, 2001, attached as Ex. A to Reliant's Mot. to Dismiss, filed Feb. 15, 2001 ("FERC Ord."). That order was issued, in part, in response to proposed Amendment No. 36 filed by the ISO on January 4, 2001 "to revise the Approved Credit Rating requirements of the [ISO] tariff." FERC Ord. at 2. Proposed Amendment No. 36

1 "gives the ISO temporary authority to waive the requirement
2 that UDCs^[16] without an Approved Credit Rating post security."
3 Id. At the time it filed Amendment No. 36, the ISO announced
4 that it would implement it immediately, and requested that the
5 FERC approve it nunc pro tunc to January 4, 2001.

6 As discussed below in connection with the ISO's motion
7 for preliminary injunction, without Amendment No. 36, the ISO
8 Tariff requires scheduling coordinators to maintain an
9 "Approved Credit Rating," or alternatively, to post security.
10 See ISO Tariff § 2.2.3.2. Scheduling coordinators that fail
11 to obey these requirements are prohibited from submitting
12 schedules to the ISO. See id. § 2.2.7.3.

13 In its February 14 order, the FERC "conditionally
14 accept[ed] Amendment No. 36 . . . for filing to become
15 effective January 4, 2001, subject to clarification and
16 guidance provided below

17" More specifically, the FERC "accept[ed] the
18 amendments to the extent they allow PG&E and SoCal Edison to
19 continue to schedule transactions from generation and over
20 transmission they own to serve their own load," and "den[ied]
21 the amendments to the extent they allow PG&E and SoCal Edison
22 to continue to schedule transactions from third-party
23 suppliers without adequate assurance of payment." Id. at 1-2.
24 According to the FERC, those "actions should help in
25 maintaining the reliability of system operations and in
26 encouraging the entry of lower-cost supply into California

27 ¹⁶ "UDC" stands for investor-owned utility distribution
28 company. PG&E and SCE are both UDCs.

1 markets." Id. at 2.

2 Reliant interprets the FERC order to hold that the
3 creditworthiness provisions of the ISO Tariff apply to all
4 real time transactions, including emergency dispatch
5 instructions. They plainly do not. In its order, the FERC
6 recognizes that the tariff's creditworthy requirements apply
7 to the *scheduled* delivery of electric power.¹⁷ As discussed
8 above and in the court's temporary restraining order, power is
9 "scheduled" in the advance market, not the real time market."¹⁸

11 The FERC order's conclusion supports this interpretation:

12 Under our order, the ISO can continue to accept the
13 UDCs' schedules to supply their load with their own
14 resources, and DWR's authority to purchase on behalf
15 of the UDCs is acceptable. Thus, *the unresolved*
16 *creditworthiness issues relate to the UDCs residual*
load that is served through the ISO's imbalance
market. Under current conditions, there is a bid
insufficiency in the ISO's imbalance energy market
causing the ISO to issue emergency dispatch

17
18 ¹⁷ See FERC Ord. at 1-2; see also id. at 10 ("The
19 creditworthiness requirements in the ISO tariff apply not only
20 when a UDC is *scheduling* delivery of power purchased from a
21 third party, but also when a UDC or its Scheduling Coordinator
22 is scheduling its own generation and using its own
23 transmission resources that are now controlled by the ISO.")
(emphasis added); id. at 12 (rejecting application of
Amendment No. 36 "beyond the UDCs and their Scheduling
Coordinators *self-scheduling* their own generation and
accessing their own transmission facilities.") (emphasis
added).

24 ¹⁸ The FERC order was filed after the court's temporary
25 restraining order. In the temporary restraining order, the
26 court agreed that enforcement of Amendment 36 would require
27 the court to modify and/or amend the ISO Tariff, and thus
28 would fall outside of its jurisdiction. See TRO at 7. The
court disagreed, however, that granting the ISO the relief it
seeks implicated Amendment 36 or was otherwise related to the
ISO Tariff's credit requirements, as the court construed
Amendment 36 to pertain solely to purchases made in the
advance market. Id. at 8.

1 instructions in order to meet this residual load and
2 balance the system. By maintaining appropriate
3 creditworthy standards that ensure payment for
4 services by a creditworthy counterparty such as DWR,
this order should increase the supply in the energy
imbalance market and reduce the need for emergency
dispatch instructions.

5 Id. at 13 (emphasis added). Here, the FERC expressly notes
6 that the creditworthiness issue is unresolved as to the
7 imbalance market. As the order indicates, the imbalance
8 market is the market that precedes the issuance of emergency
9 dispatch instructions. If the creditworthiness issue is
10 unresolved as to that market, the order cannot reasonably be
11 construed as resolving the issue as to power supplied in
12 response to emergency dispatch instructions. Moreover, the
13 FERC concludes that by enforcing credit requirements in the
14 scheduled markets, its order "should . . . reduce the need for
15 emergency dispatch instructions." Id.

16 / / /

17 In addition to proposed Amendment No. 36, the FERC also
18 purported to "act on various requests for clarification on
19 creditworthiness issues." Id. at 1. Among other things,
20 Dynegy sought "clarification that the ISO tariff penalties for
21 failure to comply with emergency dispatch instructions do not
22 apply when purchasers fail to meet the tariff creditworthiness
23 requirements." Id. at 4. While FERC initially purports to
24 address the creditworthiness aspects of Dynegy's request, it
25 later states that it will address "the penalty provision for
26 which Dynegy seeks clarification," in a later order. See id.
27 at 4, 12-13. Thus, it would appear that the FERC specifically
28 reserved comment on the issue of whether the ISO Tariff's

1 creditworthiness provisions apply to electricity provided in
2 response to emergency dispatch instructions.

3 Indeed, had the FERC decided the issue, there would have
4 been nothing left to "address" concerning Dynegy's request for
5 clarification of the applicability of penalties for refusing
6 to respond to emergency dispatch instructions, and the FERC
7 would not have deferred action on the request as it appears to
8 have done.

9 Because the FERC did not decide that the ISO Tariff's
10 creditworthiness provisions apply to the real time market, the
11 FERC's February 14 order does not moot this action. Nor does
12 the relief the ISO seeks, namely compliance with emergency
13 dispatch instructions, conflict with the FERC's February 14
14 order. Based on the above, the court rejects Reliant's
15 assertion that the FERC "recognized" that the ISO Tariff's
16 creditworthiness provisions apply to purchases in the real
17 time market.¹⁹

18
19 ¹⁹ The court also rejects Reliant's assertion that more
20 recent FERC actions "confirm that this court lacks
21 jurisdiction." See Supp. Opp'n at 4, filed Mar. 15, 2001.
22 Reliant attempts to characterize this case as a dispute over
23 the just and reasonable price of power, a matter it contends
24 the FERC resolved in its March 9, 2001 order. The issue
25 before this court is whether Reliant is obligated to respond
26 to emergency dispatch instructions, and more particularly,
27 whether the ISO Tariff's creditworthiness provisions apply to
28 power provided in response to emergency dispatch instructions.
That issue was not addressed by the FERC's March 9, 2001 order
or any other FERC order. As set forth above, that issue is
currently pending before the FERC. Reliant's arguments
concerning DWR's ability and/or obligation to ameliorate any
threat of irreparable harm are addressed below in connection
with the ISO's motion for preliminary injunction.

Reliant's reliance on the FERC's March 2001 Staff Report
is wholly misplaced. See Ex. B to Hixson Decl. in Supp. of
Supp. Opp'n, filed Mar. 15, 2001, is wholly misplaced. As
stated on the cover of the report, the recommendations

1 Accordingly, Reliant's motion to dismiss is denied.

2 **B. Motion to Stay**

3 Should the court deny its motion to dismiss, Reliant
4 alternatively argues that the court should stay the case,
5 under the primary jurisdiction doctrine, until the FERC rules
6 on the issue of whether the ISO Tariff's creditworthiness
7 provisions apply to electricity provided in response to
8 emergency dispatch instructions.

9 The ISO is entitled to bring an action for emergency
10 injunctive relief to enforce the ISO Tariff, and this court
11 has jurisdiction over such an action. See 16 U.S.C. § 825p.
12 Under the primary jurisdiction doctrine, the court, in its
13 discretion, may stay the action if its resolution concerns
14 matters that are within the special expertise of an
15 administrative agency. See Chabner v. United of Omaha Ins.
16 Co., 225 F.3d 1042, 1051 (9th Cir. 2000); Farley Transp. Co.
17 v. Santa Fe Trail Transp. Co., 778 F.2d 1365, 1370 (9th Cir.
18 1985). There is no "fixed formula" for applying this
19 doctrine, and each case must be assessed on its particular
20 facts. Chabner, 225 F.3d at 1051; Farley, 778 F.2d at 1370.

21
22 contained therein are those of the *staff*, and "do not
23 necessarily reflect the views of the Commission or any of its
24 Commissioners." Reliant notes that the report recommends that
25 "generators should be required to offer all their capacity to
26 the ISO" during a Stage 3 Emergency, and argues that if
27 generators were already so obligated, there would be no need
28 for the recommendation. As the court noted at the March 16,
2001 hearing, the report also recommends that during a Stage 3
Emergency, generators should receive payment at no less than
marginal cost. If the generators were already guaranteed
payment for such power, as Reliant contends, there would
likewise be no need for that recommendation. Accordingly, the
staff report does not advance the analysis of the issues
before the court.

1 Clearly, the FERC is an agency with special expertise
2 concerning the ISO Tariff. Absent the extreme exigencies of
3 the California power crisis, the court agrees that a stay
4 pending further action by the FERC would be proper, if not
5 routine. But those are not the facts here. Electricity is in
6 critically short supply. Rolling blackouts are a reality.
7 The health and safety of the people of California are
8 potentially at risk. In light of such imminent irreparable
9 harm, the court declines to stay this action in its entirety.

10 At the February 16, 2001 hearing, defendants assured this
11 court that while the FERC cannot grant injunctive relief, it
12 will act quickly when necessary. Despite the FERC's express
13 statement in its February 14 order that it would address the
14 applicability of the creditworthiness provisions to emergency
15 dispatch instructions in a future order, on February 22, 2001,
16 several California generators, including Reliant, filed with
17 the FERC a "Request [] For Emergency Order To Compel The
18 California Independent System Operator Corporation To Comply
19 With The Commission's February 14, 2001 Order." See Ex. A to
20 Joint Status Report, filed Mar. 9, 2001. In that emergency
21 request, the generators sought an expedited order requiring
22 the ISO "to comply *immediately* with the plain terms of the
23 Commission's February 14 order on creditworthiness issues,"
24 including enforcing the ISO Tariff's creditworthiness
25 provisions on purchases made in the real time market. See
26 Req. at 1-2. Despite the generators' allegation that the ISO
27 has "repudiated" the "clear directives" of the FERC's February
28 14 order and the extreme urgency of the request, this matter

1 has been pending before the FERC for a month.²⁰ This is by no
2 means a criticism of the FERC. Rather, it simply demonstrates
3 that a stay of this entire action may well deny the ISO's
4 ability to avert potentially imminent and irreparable harm to
5 the people of California. Accordingly, Reliant's motion to
6 stay this action in its entirety is denied.

7 Notwithstanding the above, the fact remains that the
8 critical issue in this case, namely whether the ISO Tariff's
9 creditworthiness provisions apply to electricity provided in
10 response to emergency dispatch instructions, is pending before
11 the FERC. Accordingly, the court preliminarily enjoins
12 Reliant until the FERC rules on this issue.

13 **2. DWR's Motion to Dismiss Reliant's Third-Party Complaint**

14 DWR moves to dismiss Reliant's third-party complaint on
15 the ground that it is a state agency, and thus immune from
16 suit under the Eleventh Amendment. Reliant opposes the
17 motion, arguing that the State of California (and thus, DWR)
18 has waived its immunity in this case.

19 The Eleventh Amendment prevents states from being sued by
20 citizens in federal court without the state's consent. See
21 Papasan v. Allain, 478 U.S. 265, 276 (1986); Pennhurst State
22 School & Hosp. v. Halderman, 465 U.S. 89, 100 (1984). "[T]he
23 Eleventh Amendment's bar currently applies to all suits
24 brought by an individual against an unconsenting state,

25
26 ²⁰ Since issuing its February 14, 2001 order, the FERC has
27 issued three orders concerning the practices of generators in
28 California, but has chosen not to address the application of
the creditworthiness requirements to emergency dispatch
orders.

1 regardless of the basis of jurisdiction or the citizenship of
2 the plaintiff, assuming that Congress has not abrogated the
3 states' immunity pursuant to legislation passed with the
4 requisite constitutional power." 13 Wright & Miller, Federal
5 Practice and Procedure § 3524 (Supp. 2000). Thus, arms of the
6 state such as DWR are "presumptively entitled to Eleventh
7 Amendment immunity." See Watkins v. Calif. Dept. of
8 Corrections, 100 F.Supp.2d 1227, 1229 (C.D. Cal. 2000).

9 In some circumstances, however, a state can waive its
10 Eleventh Amendment immunity. The test for determining whether
11 such a waiver has occurred "is a stringent one." See College
12 Savings Bank v. Florida Prepaid Postsecondary Educ. Expense
13 Bd., 527 U.S. 666, 119 S.Ct. 2219, 2226 (1999). "In deciding
14 whether a State has waived its constitutional protection under
15 the Eleventh Amendment, we will find waiver only where stated
16 'by the most express language or by such overwhelming
17 implications from the text as (will) leave no room for any
18 other reasonable construction.'" Edelman v. Jordan, 415 U.S.
19 651, 673 (1974) (citation omitted).

20 / / /

21 The Supreme Court has identified two circumstances in
22 which a state, by its own actions,²¹ may be found to have
23 waived its Eleventh Amendment immunity. First, waiver occurs
24 when a state voluntarily invokes the jurisdiction of the

25
26 ²¹ Waiver may also be found where Congress has validly
27 abrogated state immunity by creating private causes of action
28 against the states to redress violations of the Fourteenth
Amendment. See, e.g., Fitzpatrick v. Bitzer, 427 U.S. 445
(1976). This type of waiver is not at issue here.

1 court, for instance, by filing an action in federal court.
2 See College Savings Bank, 119 S.Ct. at 2226 (citing Gunter v.
3 Atlantic Coast Line R. Co., 200 U.S. 273, 284 (1906)).

4 Second, waiver may be found where the state makes a
5 "clear declaration" of its intention to submit itself to the
6 jurisdiction of a federal court. See id. (citing Great
7 Northern Life Ins. Co. v. Read, 322 U.S. 47, 54 (1944)). For
8 example, a state's extensive participation in pre-trial
9 activities during the pendency of a lawsuit can result in such
10 a waiver. See Hill v. Blind Indus. & Servs. Of Md., 179 F.3d
11 754, 762 (9th Cir. 1999).

12 Waiver may not be constructive or implied. See College
13 Savings Bank, 119 S.Ct. at 2229 (expressly overruling the
14 theory of "constructive waiver" set forth in Parden v.
15 Terminal R. of Ala. Docks Dept., 377 U.S. 184 (1964)). For
16 instance, a state's participation in federally-regulated
17 conduct does NOT constitute a waiver of Eleventh Amendment
18 immunity from suit in federal courts. See id. (immaterial
19 that state's conduct undertaken for profit and resembles
20 behavior of private parties).

21 / / /

22 Reliant raises two theories in support of its waiver
23 argument. These theories shall be addressed in turn.

24 **A. The Meter Service Agreement**

25 Reliant argues that DWR has expressly waived its Eleventh
26 Amendment immunity by contractually consenting to suit in
27 federal court. Specifically, Reliant points to a "Meter
28 Service Agreement for Scheduling Coordinators" entered into

1 between DWR and the ISO in 1998 (hereinafter "MSA"). See
2 Houlihan Decl., filed February 21, 2001, Ex. A. This MSA,
3 Reliant argues, contains terms allowing suit in federal court,
4 and thus, effectuates a waiver of Eleventh Amendment
5 immunity.²²

6 DWR disagrees that it has waived its immunity, stating
7 that the MSA was entered into long before the passage of AB1x,
8 and was the result of DWR's management of its own load and
9 hydroelectric resources. Thus, DWR argues, even assuming the
10 MSA effects some sort of a waiver of Eleventh Amendment
11 immunity, it does not apply to DWR's purchasing activities
12 under AB1x, and thus, does not effect a waiver with regard to
13 the claims asserted in Reliant's third-party complaint.

14 The court agrees with DWR's position. Section 11.4 of
15 the MSA, to which Reliant refers, states that DWR and the ISO:
16 irrevocably consent[] that any legal action or
17 proceeding arising under or relating to this
18 Agreement to which the ISO ADR Procedures do not

19 ²² In support of its position, Reliant cites a single
20 case, In re Innes, 184 F.3d 1275, 1282 (10th Cir. 1999). In
21 Innes, Chapter 13 debtors brought suit against Kansas State
22 University ("KSU") seeking a determination regarding the
23 dischargeability of their student loans on the theory of undue
24 hardship. KSU moved to dismiss the action on grounds of
25 Eleventh Amendment immunity. The court denied the motion,
26 holding that "KSU knowingly and voluntarily waived its
27 Eleventh Amendment immunity by agreeing, as a prerequisite to
28 its participation in the Perkins Loan Program, to undertake
certain enumerated actions in federal bankruptcy court in the
event of a claim for discharge filed by the student-borrower."
See Innes, 184 F.3d at 1284. Innes is inapplicable here,
because no federal funding program is involved or implicated.
Moreover, the Innes court observed that KSU's waiver would
have been invalid had it lacked the statutory authority to do
so. See id. Reliant fails to point to any California
statutes authorizing DWR to enter into contracts waiving
Eleventh Amendment immunity on behalf of the State of
California.

1 apply shall be brought in any of the following
2 forums, as appropriate: any court of the State of
3 California, any federal court of the United States
4 of America located in the State of California, or,
5 where subject to its jurisdiction, before the
6 Federal Energy Regulatory Commission.

7 Even assuming the MSA effectuates a waiver of immunity by DWR,
8 such waiver would extend only to suits brought by the ISO
9 relating to the MSA itself.²³ Reliant's third-party complaint
10 does not relate to, or allege violations of, the MSA.

11 Moreover, given the "stringent" test applied to determine
12 whether a state has waived its immunity, and the requirement
13 that any such waiver be found only where stated "by the most
14 express language or by such overwhelming implications from the
15 text as (will) leave no room for any other reasonable
16 construction," this court cannot conclude that the MSA
17 effectuates a general waiver of California's immunity with
18 respect to all matters, brought by any party, relating to the
19 ISO Tariff. See College Savings Bank, 119 S.Ct. at 2226;
20 Edelman, 415 U.S. at 673. Reliant's waiver argument regarding
21 the MSA is rejected.

22 **B. The State of California's Conduct in This Litigation**

23 Reliant next argues that the State of California's
24 participation in this case constitutes consent by the State of
25 California to suit in this court, thereby waiving the state's
26 Eleventh Amendment immunity. Specifically, Reliant points to

27 ²³ By this order, the court does not decide whether
28 Section 11.4 of the MSA does, in fact, waive the State of
California's immunity with respect to claims relating to the
MSA.

1 the EOB's intervention in this lawsuit, as well as DWR's
2 "litigati[on] of this action on the merits," as evidence of
3 the State of California's waiver. See Brief of Reliant, et
4 al. on Party Status of Calif. Dept. of Water Resources, filed
5 Feb. 21, 2001, at 7. As discussed below, neither of these
6 actions effectuates a waiver.

7 (1) *The EOB's Intervention*

8 Reliant argues that the EOB's intervention in this
9 lawsuit waives the State of California's immunity from suit
10 with respect to claims arising from the same "transaction or
11 occurrence" as the EOB's claims. In support, Reliant cites
12 the Ninth Circuit's recent decision in In re Lazar, 237 F.3d
13 967 (9th Cir. 2001). Reliant reads the Lazar holding far too
14 broadly.

15 In Lazar, the Ninth Circuit discussed the extent to which
16 a state waives its immunity by filing a proof of claim in
17 bankruptcy, as established in Gardner v. New Jersey, 329 U.S.
18 565 (1947), and codified at 11 U.S.C. § 106(b). After a
19 lengthy discussion of the so-called "Rule of Gardner" and the
20 circumstances presented by the case, the Lazar court held that
21 "when a state or an 'arm of the state' files a proof of claim
22 in a bankruptcy proceeding, the state waives its Eleventh
23 Amendment immunity with regard to the bankruptcy estate's
24 claims that arise from the same transaction or occurrence as
25 the state's claim." See Lazar, 237 F.3d at 978.

26 Lazar applied general rules of Eleventh Amendment
27 immunity to the unique immunity problem raised in the context
28 of a bankruptcy proceeding in which a state asserts rights to

1 an estate in bankruptcy, and then resists a claim filed by the
2 estate with respect to the same *res* within the jurisdiction of
3 the bankruptcy court. Lazar clearly is distinguishable, and
4 Reliant's attempt to apply this rule of bankruptcy law to the
5 facts of this case is unavailing.

6 Stepping outside the confines of bankruptcy law, Reliant
7 effectively attempts to circumvent DWR's Eleventh Amendment
8 immunity by characterizing Reliant's third-party complaint as
9 a counterclaim against the State of California, in light of
10 the EOB's intervention. This argument fails as well.
11 Assuming DWR and the EOB may be treated as a single entity for
12 purposes of this analysis, any possible waiver of immunity
13 would be strictly limited to compulsory recoupment
14 counterclaims. See United States v. Iron Mountain Mines, 952
15 F.Supp. 673, 678-79 (E.D. Cal. 1996) (state's filing of CERCLA
16 action did not constitute general waiver of Eleventh Amendment
17 immunity); United States v. Montrose Chem. Corp. of Calif.,
18 788 F.Supp. 1485, 1492-93 (C.D. Cal. 1992) (Eleventh Amendment
19 immunity waived as to compulsory recoupment counterclaims in
20 tort by filing CERCLA action); see also Oregon v. City of
21 Rajneeshpuram, 598 F.Supp. 1217, 1219 (D. Or. 1984) (by
22 bringing action in federal court, state waives its Eleventh
23 Amendment immunity with respect to all counterclaims arising
24 out of same transaction or occurrence, "at least to the extent
25 that the counterclaims do not exceed the amounts sought in the
26 state's claim"); Georgia Dept. of Human Resources v. Bell, 528
27 F.Supp. 17, 26 (N.D. Ga. 1981) ("[B]y bringing suit against a
28 private party the State waives its Eleventh Amendment immunity

1 and consents to the court's jurisdiction of . . .
2 counterclaim[s] asserted defensively, by way of recoupment,
3 for the purpose of defeating or diminishing the State's
4 recovery, but not for the purpose of obtaining an affirmative
5 judgment against the State.)" (citations omitted).

6 Here, the EOB's intervention in the ISO's lawsuit seeks
7 injunctive relief ordering Reliant (and other generators) to
8 comply with the emergency dispatch instruction provisions of
9 the ISO Tariff. No monetary damages are sought. By contrast,
10 Reliant's third-party complaint (which, obviously, is not a
11 counterclaim, much less a compulsory counterclaim), seeks
12 declaratory and injunctive relief ordering DWR to use state
13 funds to purchase power from any and all energy markets. See
14 Verified Third Party Complaint, filed Feb. 12, 2001, at 8-10.
15 Clearly, resolution of these claims in Reliant's favor would
16 constitute an affirmative judgment against the State. These
17 claims also would require the payment of state funds, and do
18 not serve merely to reduce a monetary claim, since the State
19 of California (through the EOB) is not seeking money damages.
20 Thus, by the EOB's intervention, the State of California
21 cannot be said to have waived its immunity with respect to
22 Reliant's third-party complaint. See Bell, 528 F.Supp. at 26.

23 *(2) DWR's Activities in this Litigation*

24 Reliant next argues that DWR's actions in this case
25 constitute litigation on the merits, thereby waiving its
26 immunity. The court disagrees. To date, DWR has (1) joined
27 in the ISO's opposition to Reliant's motion to dismiss, (2)
28 filed a brief and declaration supporting ISO's application for

1 a temporary restraining order, and (3) appeared at the TRO
2 hearings. All of these actions occurred within the first
3 month after the ISO filed this action. DWR's involvement to
4 date falls far short of that required for a finding of waiver
5 on grounds of active involvement in pre-trial activities. See
6 Hill, 179 F.3d at 765 (state agency waived Eleventh Amendment
7 immunity by actively litigating the case on the merits, and
8 waiting to raise its immunity defense until the first day of
9 trial). Reliant's waiver argument regarding DWR's involvement
10 in this litigation is rejected.²⁴

11 In sum, DWR has met its burden of demonstrating that as
12 an arm of the State of California, it is presumptively immune
13 from suit in federal court. Reliant fails to show how the
14 State of California waived this immunity. Accordingly, DWR's
15 motion to dismiss Reliant's third-party complaint is granted.

16 / / /

17 / / /

18
19 ²⁴ Reliant further argues that if this court grants DWR's
20 motion to dismiss, it should go one step further and dismiss
21 this entire case for failure to join an indispensable party.
22 See Fed. R. Civ. P. 19(b). DWR is not an indispensable party,
23 however. Under Rule 19(b), the determination of whether a
24 party is indispensable to an action "requires the
25 consideration of four factors: (1) the extent to which a
26 judgment rendered in the person's absence might be prejudicial
27 to the person or those already parties; (2) the extent to
28 which, by protective provisions in the judgment, by the
shaping of relief, or other measures, the prejudice can be
lessened or avoided; (3) whether a judgment rendered in the
person's absence will be adequate; and (4) whether the
plaintiff will have an adequate remedy if the action is
dismissed for nonjoinder." Clinton v. Babbitt, 180 F.3d 1081,
1090 (9th Cir. 1999). None of these factors weighs in favor
of declaring DWR an indispensable party. The court can fully
and fairly adjudicate the claims presented in ISO's complaint
without DWR's presence in this case. Reliant's request is
denied.

1 **3. The ISO's Motion For A Preliminary Injunction**

2 The standard for issuing a preliminary injunction is the
3 same as the standard for issuing a temporary restraining
4 order. See Dumas v. Gommerman, 865 F.2d 1093, 1095 (9th Cir.
5 1989). To qualify for a preliminary injunction, the moving
6 party must show (1) a probability of success on the merits,
7 and (2) the possibility of irreparable injury should the
8 restraining order not issue. See id. These factors represent
9 two points on a sliding scale, such that "the greater the
10 relative hardship to the moving party, the less probability of
11 success must be shown." Sun Microsystems, Inc. v. Microsoft
12 Corp., 188 F.3d 1115, 1119 (9th Cir. 1999) (citation omitted).
13

14 After the ISO filed and the court heard the motion for a
15 preliminary injunction, all defendants but Reliant entered
16 into a stipulation with the ISO pursuant to which those
17 defendants will continue to respond to emergency dispatch
18 instructions until the FERC rules on the February 22 emergency
19 request. Accordingly, the ISO's motion for a preliminary
20 injunction as to those defendants is denied without prejudice,
21 and the court addresses the appropriateness of a preliminary
22 injunction as to Reliant only.

23 **A. Likelihood of Success**

24 The ISO seeks to compel Reliant to comply with the
25 emergency dispatch instructions. Reliant is obligated to
26 comply with the provisions of the ISO Tariff by virtue of its
27 participation in the California electricity market and use of
28 the California power grid. Reliant has also entered into a

1 Participating Generator Agreement with the ISO, which requires
2 it, as well as the ISO, to comply with the provisions of the
3 ISO Tariff.

4 Section 5.1.3 of the ISO Tariff provides:

5 Each Participating Generator shall take, at the
6 direction of the ISO, such action affecting such
7 Generator, as the ISO determines to be necessary to
8 maintain the reliability of the ISO Controlled Grid.
Such actions shall include . . . (a) compliance with
the ISO's Dispatch Instructions.

9 Section 5.6.1 similarly establishes the ISO's authority

10 to instruct a Participating Generator to bring its
11 Generating Unit on-line, off-line, or increase or
12 curtail the output of the Generating Unit . . . if
13 such an instruction is reasonably necessary to
14 prevent an imminent or threatened System Emergency
15 or to retain Operational Control . . . during an
16 action System Emergency.

17 Notwithstanding these express obligations, Reliant
18 contends that its obligation to respond to emergency dispatch
19 instructions is discharged by the absence of a creditworthy
20 buyer. In other words, Reliant contends that the
21 creditworthiness provisions set forth in the ISO Tariff apply
22 to electricity provided in response to emergency dispatch
23 instructions and scheduled transactions alike.

24 As outlined in the temporary restraining order, the ISO
25 Tariff requires scheduling coordinators to maintain an
26 "Approved Credit Rating," or alternatively, to maintain
27 security in an amount intended to cover its outstanding and
28 estimated liability. See ISO Tariff § 2.2.3.2. It is
undisputed that PG&E, SCE and their scheduling coordinator no
longer maintain an "Approved Credit Rating" as that term is
defined in the ISO Tariff. Thus, they must post security.

1 See id. § 2.2.7.3. Scheduling coordinators that fail to meet
2 these requirements are prohibited from submitting a schedule
3 to the ISO. See id. Power is "scheduled" in the advance
4 market, not the real time market. Accordingly, scheduling
5 coordinators that fail to maintain an "Approved Credit Rating"
6 cannot participate in the advance scheduling process. It does
7 not, however, follow that the ISO Tariff bars the ISO from
8 issuing emergency dispatch instructions to meet the need of
9 customers of scheduling coordinators that do not meet the
10 Tariff's credit requirements.

11 As detailed above, Amendment No. 36, as adopted by the
12 FERC, partially relieves scheduling coordinators of this
13 responsibility in that it allows them to participate in the
14 advance market despite their failure to maintain an approved
15 credit rating, or alternatively, post security. FERC's
16 February 14 order does not change the analysis or this court's
17 preliminary conclusion that the creditworthiness provisions
18 apply only to power scheduled in the advance market.

19 In its supplemental opposition filed the afternoon before
20 the status conference, Reliant argues for the first time that
21 the "ISO's requested injunction would violate the commerce
22 clause." More particularly, Reliant argues that the ISO's
23 position that its emergency dispatch instructions "trump" any
24 existing contracts California generators have with purchasers
25 in other states undermines federal policy and violates the
26 commerce clause, as it "impedes the development of a broader
27 regional market in the West."

28 Reliant's argument, however, fails to take into account

1 that the ISO issues emergency dispatch instructions when
2 reliability criteria issued by the Western Systems
3 Coordinating Council ("WSCC") are violated. See Detmers
4 Decl., filed Mar. 20, 2001, ¶ 7. According to James Detmers,
5 Acting Vice President of Operations for the ISO, "[t]he WSCC
6 is a reliability counsel for the sub-region of North American
7 Electric Reliability Council ("NERC") which includes the
8 western United States, and portions of Canada and Mexico."
9 Id. The WSCC's reliability criteria relied on by the ISO were
10 established to protect the entire Western Regional grid, which
11 covers California, Oregon, Washington, Idaho, Nevada, Utah,
12 Colorado, New Mexico, Arizona, Montana, Wyoming and portions
13 of Canada and Mexico. Id. Thus, contrary to Reliant's
14 assertions, the ISO does not issue emergency dispatch
15 instructions "at the expense" of its neighbors, but rather
16 pursuant to a set of criteria designed to protect the entire
17 Western region. Given the above, Reliant's eleventh hour
18 argument that the ISO's issuance of emergency dispatch
19 instructions violates interstate interests rings hollow.

20 For the reasons set forth above, the court finds that
21 there is a substantial likelihood that the ISO will prevail on
22 the merits.²⁵

23
24 ²⁵ Reliant previously argued that its obligation to comply
25 with the provisions of the ISO Tariff was discharged by the
26 ISO's failure to comply with the ISO Tariff's creditworthiness
27 provisions. This court rejected that argument, finding that
28 the ISO Tariff has the force and effect of a federal statute,
and thus, the ISO's failure to comply with the provisions of
the ISO Tariff does not discharge Reliant's duties thereunder,
as it might if the ISO Tariff was merely a contract between
the parties. See TRO at 6-7. Coughlin v. Trans World

B. Irreparable Harm*(1) Harm to the Public*

As noted in the court's temporary restraining order, the State of California is confronting an energy crisis of catastrophic proportions. On January 17, 2001, Governor Gray Davis proclaimed a State of Emergency in response to California's energy crisis. In January and February of this year, the ISO has declared a series of Stage 3 Emergencies and ordered rolling blackouts on several occasions.

At the February 7, 2001 hearing, Mr. Detmers testified that the ISO has been forced to rely on the real time market for a considerable period of time. At the March 16, 2001 status conference, counsel for the ISO maintained that the

Airlines, Inc., 847 F.2d 1432 (9th Cir. 1988), relied on by Reliant, does not alter the court's analysis. In the thirteen years since Coughlin was decided, it has been cited only eight times (three in the Ninth Circuit), and it has never been applied outside the common carrier context. Nor did that case involve the public interest concerns present here. No court has given Coughlin the sweeping effect urged by Reliant, and the court declines to do so here.

More importantly, however, Reliant's argument was prefaced on the ISO's unilateral implementation of Amendment No. 36 prior to approval by the FERC. As noted above, after the court issued its temporary restraining order, the FERC ruled on Amendment No. 36. In pertinent part, as set forth above, the FERC rejected Amendment 36 "to the extent [it] allow[s] PG&E and SoCal Edison to continue to schedule transactions from third-party suppliers without adequate assurance of payment." FERC Ord. at 1-2. There is no evidence, or allegation, that the ISO has breached the FERC's February 14, 2001 order as to purchases made in the advance market. Rather, Reliant contends that the ISO repudiated that order by failing to extend those requirements to power provided in response to emergency dispatch instructions. As set forth above, the court rejects this contention. Accordingly, the ISO is not presently breaching the ISO Tariff or the FERC's February 14 order, and to the extent Reliant argues that its current obligation to respond to emergency dispatch orders is discharged by the ISO's breach, that argument is without merit.

1 potential threat of imminent irreparable harm has not changed
2 in any appreciable degree over the past few weeks. While the
3 number of emergency dispatch instructions issued in recent
4 weeks has declined dramatically, counsel for the ISO
5 explained that unusual, unexpected events can, and do, occur
6 and continue to pose an imminent threat of irreparable harm to
7 the people of the State of California. See also Detmers
8 Decl., filed Mar. 20, 2001, ¶¶ 6, 9, and Exs. D, F attached
9 thereto. Such unplanned events include generators "falling
10 off-line," transformer burns, and downed power lines. Id.
11 For example, a Stage 2 Emergency was declared on March 14,
12 2001 when power from out-of-state providers dropped by 1,200
13 megawatts. Id. ¶ 3. Moreover, at approximately 6:00 a.m. on
14 March 19, 2001, the ISO declared a Stage 2 Emergency due to
15 insufficient system resources. By noon that same day, a Stage
16 3 Emergency was declared after "two units at a facility
17 tripped offline." Id. ¶ 4. Immediately thereafter, the ISO
18 determined that it was necessary to curtail firm load, and
19 rolling blackouts again darkened the California landscape.
20 Id.

21 According to Mr. Detmers, the shortfalls in power vary
22 from 2,000 - 3,000 megawatts to 8,000 - 10,000 megawatts. A
23 Stage 3 Emergency occurs when the under-arranged amount ranges
24 from 7,000 - 8,000 megawatts. Reliant controls approximately
25 3,800 megawatts of generating capacity in California. While
26 the precise amount of electricity available from Reliant to
27 respond to emergency dispatch instructions is uncertain and in
28 dispute, it is nevertheless significant, and its loss poses an

1 imminent threat of blackouts. Reliant has never disputed that
2 such blackouts pose a dire threat to public health and safety.
3 See Mississippi Power & Light v. United Gas Pipe Line Co., 760
4 F.2d 618, 623 (5th Cir. 1985) (injury to public may suffice as
5 irreparable harm in private action); see also Northern Indiana
6 Pub. Serv. Co. v. Carbon County Coal Co., 799 F.2d 265, 280
7 (7th Cir. 1986) (injury to public may suffice as irreparable
8 harm where public is essentially real party in interest).

9 (2) *Role of DWR*

10 Reliant continues to argue that any potential for
11 irreparable harm could be cured by DWR. But even assuming DWR
12 could single-handedly palliate the crisis, the Eleventh
13 Amendment precludes this court from subjecting DWR to its
14 jurisdiction. Nor, as a practical matter, does it appear DWR
15 can or will ride to the rescue at any cost. Indeed, the
16 evidence suggests otherwise. As Reliant points out, DWR has
17 refused to extend the February 16, 2001 agreement pursuant to
18 which DWR agreed to pay Reliant a certain contract price for
19 power provided in response to emergency dispatch instructions
20 until March 23, 2001.²⁶ Nor is there any authority that the
21 ISO can exercise to require DWR to pay Reliant any amount for
22 electricity.

23
24 ²⁶ Reliant points to DWR's demonstrated ability to pay for
25 power provided in response to emergency dispatch instructions,
26 as evidenced by the February 16 agreement. According to
27 Reliant, any potential for irreparable harm is caused by DWR's
28 refusal to accept the FERC price. Reliant points out that the
FERC's March 9, 2001 order established \$273/MWh as a
presumptively just and reasonable price during Stage 3
Emergencies in California. To the extent the prices charged
by Reliant exceed that cap, Reliant argues that DWR can seek
review by the FERC.

1 Reliant, in essence, asks this court to do equity.
2 "Equity," in this context, however is circumscribed by the
3 filed rate doctrine. As a result, and as all of the parties
4 have acknowledged, the court's jurisdiction is, therefore,
5 limited to *enforcing* the tariff.

6 As an alternative to issuing a preliminary injunction,
7 Reliant urges the court to require DWR to contract with
8 Reliant. Not only does the court lack jurisdiction over DWR,
9 but the court is not aware, nor does Reliant cite to, any
10 authority that empowers the court to force anyone, let alone
11 the State of California, to enter into a contract.

12 The court does not discount the economic harm suffered by
13 Reliant and similarly-situated generators. However, the
14 potential harm to generators that may result from this order
15 must be put into context. Electricity provided pursuant to
16 emergency dispatch instructions currently accounts for
17 approximately 12.5% of electricity provided in the relevant
18 market. Moreover, pursuant to the FERC's order, creditworthy
19 buyers are required for electricity sold in the advance
20 market, which accounts for 75% of the electricity sold in the
21 relevant market. Thus, this case is not about Reliant not
22 being paid for *any* of the power it provides.²⁷ More
23

24 ²⁷ The court notes that despite potential and actual
25 economic harm to generators posed by the failure of
26 California's public utilities to pay for past purchases, the
27 ISO and the EOB argue that California's power crisis has been
28 an economic windfall to Reliant and other generators. See,
e.g., Reliant Press Release, dated Jan. 26, 2001, attached as
Ex. E to Application for TRO, filed Feb. 6, 2001; Reliant's
SEC filings, attached as Exs. A-C to EOB's Req. for Judicial
Notice, filed Feb. 14, 2001.

1 importantly, however, purely economic harm is an insufficient
2 basis upon which to grant or deny a preliminary injunction.
3 harm. See Rent-A-Center, Inc. v. Canyon Television &
4 Appliance Rental, Inc., 944 F. 2d 597, 603 (9th Cir.1991)
5 ("economic injury alone does not support a finding of
6 irreparable harm . . .") Reliant has failed to demonstrate
7 that its long-term viability is threatened by the relief
8 sought.

9 / / /

10 In an enforcement action such as this, the court must
11 enforce the Tariff as it is written. To the extent Reliant
12 contends the Tariff is unfair, that is a matter for the FERC,
13 not this court. Accordingly, the court finds that the
14 potential for imminent irreparable harm to the public remains.

15 CONCLUSION

16 Accordingly, IT IS ORDERED THAT:

17 1. Reliant's motion to dismiss or stay the matter in
18 its entirety is DENIED.

19 2. DWR's motion to dismiss Reliant's third-party
20 complaint is GRANTED.

21 3. The ISO's motion for preliminary injunction as to
22 Dynegy, AES and Williams is DENIED WITHOUT PREJUDICE.

23 4. The ISO's motion for a preliminary injunction as to
24 Reliant is GRANTED. Reliant shall continue to respond to
25 emergency dispatch instructions until the FERC issues a ruling
26
27
28

1 on the pending Request for an Order to Comply.²⁸ The parties
2 shall immediately notify the court of the FERC ruling, and the
3 court will set the matter for a further status conference
4 within five days of said notification. The parties shall file
5 and serve a joint status conference statement at least one day
6 prior to such conference. If no order is issued by the FERC
7 within 60 days of this order, a further status conference
8 shall be held on May 25, 2001 at 10:00 a.m. The parties shall
9 file and serve a joint status conference statement not later
10 than May 18, 2001.

11 5. The bonding requirement under Fed. R. Civ. P. 65(c)
12 is waived, as the ISO, a not-for-profit public benefit
13 corporation, is unable to post a substantial bond. See People
14 of State of California ex rel. Van de Kamp v. Tahoe Regional
15 Planning Agency, 766 F.2d 1319, 1325 (9th Cir. 1985).

16 6. The ISO's objections to Exhibits H-N to the
17 Declaration of Thomas S. Hixson In Support of the Supplemental
18 Opposition to Preliminary Injunction, filed Mar. 15, 2001,
19 Exhibits A, B & C to Declaration of Thomas S. Hixson In
20 Support of the Supplemental Opposition to Preliminary
21 Injunction (Attaching Highly Confidential Documents), filed
22 Mar. 15, 2001, and Exhibits F, G & H to Hixson Declaration,
23 are SUSTAINED. The first two sets of exhibits referred to
24 above are not relevant, in any appreciable way, to the brief
25 they purport to support. The last set of exhibits, press
26

27 ²⁸ The stipulation entered into by the ISO, Dynegy and
28 Williams employs the identical language. See Stip. & Ord.,
filed Mar. 21, 2001.

1 reports relating to long-term power contracts, constitute
2 inadmissible hearsay. See Fed. R. Evid. 801.

3 IT IS SO ORDERED.

4 DATED: March 21, 2001.

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FRANK C. DAMRELL, Jr.
UNITED STATES DISTRICT JUDGE